Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 1998 Term,

SUSAN D. BIERI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Was petitioner properly denied a certificate of appealability from her 1998 petition, filed pursuant to 28 U.S.C. § 2255, on the ground that the petition was "successive?"

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PARTIES

All parties in this case are identified on the cover page.

OPINION BELOW

Ms. Bieri seeks review of the Circuit Court's order affirming denial of a certificate of appealability which certificate was denied on the ground that Ms. Bieri's request for relief from a November 7, 1997 final order was a successive petition. The opinion of the Court of Appeals is included in the appendix at 1a. The district court's order which was appealed is included in the appendix at 2a.

JURISDICTION

Jurisdiction of the district court was pursuant to 28 U.S.C. § 2255 and jurisdiction of the Eighth Circuit Court was invoked pursuant to Title 18 U.S.C. § 3742 and Title 18 U.S.C. § 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and Hohn v. United States, __ U.S. ___, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

STATUTORY PROVISION

28 U.S.C. § 2255, paragraph eight provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2244 provides in part that:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention had been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

STATEMENT OF THE CASE

Petitioner Susan Bieri filed a petition pursuant to 28 U.S.C. § 2255 on March 24, 1998 in the district court for the Western District of Missouri. This petition for relief of her sentence, as it related to a criminal forfeiture, was Ms. Bieri's first § 2255 petition filed after the final sentencing order was filed November 7, 1997. District Court Docket Entry #199.[1]

Susan Bieri's case and her husband Leonard Bieri's companion case have a long procedural history in both the district court for the Western District of Missouri and in the Eighth Circuit Court of Appeals. See District Court for Western District of Missouri case # 92-CR-3044 and United States v. Bieri, 68 F.3d 232 (8th Cir. 1995), cert. denied, 517 U.S. 1233 (1996), United States v. Bieri, 21 F.3d 819 (8th Cir.), cert. denied, 513 U.S. 878 (1994), United States v. Bieri, 21 F.3d 811 (8th Cir.), cert. denied, 513 U.S. 878 (1994).

In 1996 Ms. Bieri filed a § 2255 petition in the district court attacking the district court's sentence of incarceration which was entered on July 3, 1996. District Court Docket Entry # 159. The basis for Ms. Bieri's 1996 motion was ineffective assistance of counsel. At the time Ms. Bieri filed her

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[1] All references to the District Court Docket are to File Number 92-CR-3004, Western District of Missouri, Southern Division (Spingfield).

1996 § 2255 motion, that portion of her sentence relating to criminal forfeiture had not yet been entered. In fact, the district court entered a preliminary order of forfeiture on July 24, 1996 and the final order was entered on November 7, 1997. See District Court Docket Entries #165 and #199.

Ms. Bieri, proceeding pro se in 1998, erroneously believed she needed permission from the courts to file a § 2255 petition because she filed a petition in 1996. Ms. Bieri was mistaken because the orders, from which relief was sought, were completely different. The district court accepted Ms. Bieri's suggestion that her motion was a successive petition and denied the petition on that basis without getting to the merits. See Order in Appendix at 3a -4a. Subsequently Ms. Bieri sought, from the district and then the circuit court, a certificate of appealability. The district court denied her request for a certificate of appealability on the ground that her 1998 § 2255 motion was successive. See Appendix at 2a. The Eighth Circuit of Appeals similarly denied petitioner a certificate of appealability. See Appendix at 1a.

Petitioner seeks a writ reversing the lower court's denial of a certificate of appealabillity. The lower courts (and even petitioner while acting pro se) misconstrued the 1998 § 2255 motion as a successive petition to the 1996 motion. The 1998 § 2255, although petitioner's second such pleading, was

not a "successive" petition as defined by statute and the 1998 petition attacked an order that had not been entered at the time of the 1996 petition.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit Court of Appeals ratified the district court's gross departure from the accepted and usual course of judicial proceedings when it affirmed the denial of a certificate of appealability for a purportedly "successive" petition, which petition was not in fact successive, thus necessitating an exercise of this Court's supervisory power.

The Eighth Circuit Court of Appeals sanctioned and affirmed a ruling of the district court on petitioner's application for a certificate of appealability on the denial of a motion to vacate her sentence pursuant to 28 U.S.C. § 2255. Judgment, Bieri v. United States, No. 98-3364 (8th Cir. Sept. 30, 1998) at 1a. The district court had denied the application for certification of appealability, noting that the § 2255 petition was denied "on the basis that it was the second motion to vacate, set aside or correct her sentence," and that previously the Eighth Circuit Court of Appeals had denied petitioner's motion for authorization to file successive habeas corpus motions. Order, Bieri v. United States, No. 98-3136 (W.D.Mo. Sept. 11, 1998) at 2a.

The reason for the denial of petitioner's application for certificate of appealability was that petitioner had filed a successive petition pursuant to § 2255 without appropriate authorization under 28 U.S.C. § 2244. This is a gross departure from the accepted and usual course of judicial

proceedings where petitioner had not filed a successive or second § 2255 petition to the judgment.

1. Petitioner's 1998 motion to vacate pursuant to 28 U.S.C. § 2255 raised claims that were not presented or even ripe in her prior habeas corpus petition.

Petitioner filed one prior motion pursuant to § 2255 on July 3, 1996. Petitioner raised only one "claim" or "ground" in that petition challenging her conviction, that of ineffective assistance of counsel, and included several different legal and factual arguments in support of that claim. See, e.g., Sanders v. United States, 373 U.S. 1, 16, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963) (defining "ground" as "sufficient legal basis for granting the relief sought" and noting that "identical grounds may often be proved by different factual allegations ... or legal arguments").

Petitioner later filed the instant motion pursuant to § 2255 on March 24, 1998. Petitioner raised a challenge only to the sentence in this case, specifically the criminal forfeiture of real property. This was a new claim by petitioner.

2. Petitioner's new claim in her 1998 motion to vacate pursuant to 28 U.S.C. § 2255 does not qualify as a "second or successive application."

Certain statutory changes enacted in the Antiterrorism and Effective Death Penalty Act (AEDPA) operate as "a 'gate-keeping' mechanism for

the consideration of second or successive applications in the district court." Felker v. Turpin, 518 U.S. 651, 657, 116 S.Ct. 2333, 2337, 135 L.Ed.2d 827 (1996) (citing 28 U.S.C. § 2244(b)). However, this Court has decided that certain claims are not a "second or successive" petition. In Stewart v. Martinez-Villareal, ___ U.S. ___, ___, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998) this Court held that respondent's Ford claim was not a "second or successive" petition where it had been previously dismissed as premature and was raised again later when it was ripe. 118 S.Ct. at 1622. In its discussion, this Court noted another example: where the first § 2254 of the petitioner is not adjudicated on grounds of failure to exhaust state remedies and then the petitioner later returns to a federal habeas court after exhausting those remedies. Id.

Yet a different situation was noted by the Seventh Circuit: when the first petition is successful, and the prisoner contends that new errors ensued. Walker v. Roth, 133 F.3d 454 (7th Cir. 1997). In that case, the petitioner's first collateral attack led to a directive that he be resentenced, and the Seventh Circuit held that he did not need advance appellate approval to challenge the procedures that yielded his new sentence. Id. at 455.

In a later Seventh Circuit case, both Martinez-Villareal and Walker

were used to support a determination that a numerically second petition under § 2255 did not qualify as a "second or successive" petition pursuant to that section's paragraph 8. See Shepeck v. United States, 150 F.3d 800, 801 (7th Cir. 1998) (petitioner did not need prior appellate approval to file his second § 2255 petition challenging ineffective assistance of appellate counsel which did not occur until after the granting of the first petition under § 2255).

Martinez-Villareal ___ U.S. ___, ___, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998) and other cases among the circuit courts provide that pre-AEDPA law still applies to a determination of whether petitions qualify as "second or successive" based on the policies underlying the restrictions on successive petitions (rather than based on a simple numerical count of petitions). See, e.g., Reeves v. Little, 120 F.3d 1136, 1138 (10th Cir. 1997) ("[i]n determining what is a 'second or successive' motion under the statute, the circuits which have reviewed this question use the ... standard in effect before AEDPA was enacted" (citing cases)); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997) (per curiam) (since "nothing in the AEDPA affects the determination of what constitutes a 'second or successive' petition," court relied on pre-Act caselaw).

This means that if a petitioner overturns a conviction or sentence in a

habeas corpus proceeding and is reconvicted or resentenced, a second petition challenging the new conviction or sentence attacks a different judgment and accordingly is not successive. 2 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 28.3b at 918 (2d ed. 1994). Shepeck v. United States, 150 F.3d 800 (7th Cir. 1998) is a perfect example. In that case, the petitioner sought to file a § 2255 motion to challenge the effectiveness of his appellate attorney. 150 F.3d at 800. He had previously prevailed on a § 2255 petition pursuant to Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994)[2] and was resentenced. Id. The Seventh Circuit concluded that this was not a "second or successive" petition under § 2255, ¶ 8 and held that the petitioner "does not need our approval to commence what will be his first substantive challenge to his sentence." Id. at 801.

As in Shepeck, petitioner's instant motion pursuant to § 2255 is not a "second or successive" petition because it challenges a different judgment than the one she challenged in her earlier petition. Here, petitioner's original sentence included forfeiture of one of four tracts of land on

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[2] Shepeck's trial attorney had abandoned him after his sentence was imposed. 150 F.3d at 800. Under Castellanos, this was a Sixth Amendment violation which entitled Shepeck to vacatur and reentry of judgment so a direct appeal could be timely prosecuted. Id.

petitioner's farm. United States v. Bieri, 21 F.3d 819, 821 (8th Cir.), cert. denied, 513 U.S. 878 (1994). Petitioner filed a direct appeal challenging the forfeiture. Id. at 820. The government cross-appealed, arguing that the district court erred in ordering forfeiture of only one tract of the farm. Id. The Eighth Circuit reversed the district court's order to forfeit only part of the farm and remanded for further proceedings. Id. at 825. The district court on remand ordered no forfeiture. United States v. Bieri, 68 F.3d 232, 234 (8th Cir. 1995), cert. denied, 517 U.S. 1233 (1996). The government appealed. Id. The Eight Circuit reversed and remanded with directions to the district court to enter an order forfeiting the entire farm. Id. at 238.

Petitioner's 1996 motion pursuant to § 2255 was filed on July 3, 1996. At that time, the district court had not yet resolved the remanded matter of the criminal forfeiture. The first § 2255 motion challenged petitioner's original judgment of conviction and prison sentence on the ground that she received ineffective assistance of trial counsel. Since there was no judgment of forfeiture at that time, the present challenges to the forfeiture were not yet ripe.

The district court ordered a preliminary order of forfeiture on July 24, 1996, but there was no final order of forfeiture entered until November 6, 1997. At that time, petitioner was in effect resentenced as to the criminal

forfeiture. Petitioner is entitled to one challenge pursuant to § 2255 of this final judgment as to the new sentence. The procedural posture of resentencing because the government appealed and won is no different than if petitioner had won relief on her sentence and been resentenced, whereupon she would be entitled to challenge her sentence. Similar to the petitioner in Shepeck, petitioner here did not need approval to file a second petition "because the arguments [s]he now seeks to present were unripe until [s]he was resentenced after [her] first § 2255 petition." 150 F.3d at 801.

Because petitioner's instant motion pursuant to § 2255 was not a "second or successive" petition, the district court's denial of her certificate of appealability on that basis was erroneous. Just as in Stewart v. Martinez-Villareal, ___ U.S. ___, ___, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), petitioner has never received an adjudication of her § 2255 claims regarding the criminal forfeiture, and to deny her relief on the ground that her petition was successive "would bar the [petitioner] from ever obtaining federal habeas review." ___ U.S. at ___, 118 S.Ct. at 1622. Such a result is a gross departure from the accepted and usual course of judicial proceedings.

3. Petitioner's unnecessary application for authorization to file a successive § 2255 motion is irrelevant.

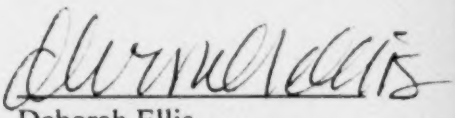
Petitioner, acting pro se, erroneously believed her instant petition was a second or successive petition and applied for authorization to file a successive habeas application prior to filing the instant petition. The Eighth Circuit Court of Appeals denied that motion on January 28, 1998. However, petitioner filed the instant petition anyway on March 24, 1998.

Where petitioner did not need authorization to file her petition because it was not successive, see Shepeck, 150 F.3d at 801, the fact that she did so and was denied does not affect her later petition. In addition, where she was acting pro se, the fact that she took an erroneous position that she needed authorization to file her petition should not be used against her. Cf. Haines v. Kerner, 405 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972) (holding pro se litigant to less stringent standard).

CONCLUSION

For the foregoing reasons, petitioner submits that her Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3364WMS

Susan D. Bieri,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
	*	District Court for the
	*	Western District of Missouri
United States of America,	*	
	*	
Appellee.	*	

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied.

September 30, 1998

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

SUSAN D. BIERI,	)	
	)	
Movant,	)	
	)	
vs.	)	No. 98-3136-CV-S-RGC
	)	
UNITED STATES OF AMERICA,	)	Criminal Case No.
	)	92-03044-01-CR-S-RGC
Respondent.	)	

ORDER

On September 9, 1998 movant filed an application for a certificate of appealabillity and a notice of appeal. On August 31, 1998 the Court denied the motion filed pursuant to 28 U.S.C. § 2255 on the basis that it was the second notion to vacate, set aside or correct her sentence. On January 28, 1998 the Eighth Circuit of Appeals denied her motion for authorization to file successive habeas corpus motions. It is

ORDERED the application for certification of appealibility is denied.

RUSSELL G. CLARK, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated: Sep 11 1998

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

SUSAN D. BIERI,	)	
	)	
Movant,	)	
	)	
vs.	)	No. 98-3136-CV-S-RGC
	)	
UNITED STATES OF AMERICA,	)	Criminal Case No.
	)	92-03044-01-CR-S-RGC
Respondent.	)	

ORDER

On April 2, 1993, the Court sentenced movant to imprisonment for a term of 51 months and to supervised release for a period of three years for violations of 21 U.S.C. §§ 843 and 841 (1)(a) and (b)(1)(C). On July 3, 1996 movant filed a motion to vacate, set aside or correct her sentence pursuant to 28 U.S.C. §2255. The Court denied the motion on October 17, 1996. On March 24, 1998 the movant filed a second motion to vacate the sentence of forfeiture pursuant to 28 U.S.C. 2255. This motion was filed after the Eighth Circuit Court of Appeals on or about January 28, 1998 denied her motion for authorization to file successive habeas motions. On August 27, 1998 the United States filed a response to the March 24 motion. While the United States presents several reasons why the motion should be denied, it can be denied for a simple reason. 28 U.S.C. §2255 provides that a second or successive motion must be certified by the Court of Appeals. The Court of Appeals definitely refused to certify a second or successive motion in its order of January 28, 1998. It is

ORDERED the motion to vacate the sentence of forfeiture is denied.

RUSSELL G. CLARK, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated: AUG 31 1998

Appendix 4a